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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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IN RE PET FOODS PRODUCTS	)	MDL No. 1850
LIABILITY LITIGATION	)	Master Docket: 07 CV 2867 (NLH)(AMD)
	)	ALL CASES
	)	

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**NATIONAL PLAINTIFFS' CONSOLIDATED  
REPLY TO THE APPLICATION FOR LEAD COUNSEL  
SUBMITTED BY THE BERGER/WEXLER GROUP**

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**NATIONAL PLAINTIFFS' REPLY TO THE  
BERGER/WEXLER LEAD COUNSEL MOTION**

**I**  
**INTRODUCTION**

All of the attorneys currently applying for lead counsel in this case have been appointed to leadership positions in the past and have proved themselves capable of serving in lead positions in certain class cases. This is not in dispute. Neither the Consumer Counsel Group nor the Berger/Wexler Group has argued that any of the applicants fail to satisfy the requisites for leadership of Rule 23(g). The question is which attorneys will best serve the plaintiffs in this case, based on past similar experience and real commitment to the case thus far. As previously detailed, the Consumer Counsel Group believes that the three-way proposed structure of Attorneys William M. Audet, Scott A. Kamber, and Jay Edelson should be selected by this Court to lead in this case.

As the case has recently progressed, however, it has also become clear that where these two Groups are equally represented, the class members have already been well served on a host of important issues. In fact, representatives of the two Groups have been working together over the last several months and this cooperation has accelerated since the filing of the initial applications for lead counsel. Specifically, in the last two weeks alone, a host of major issues have been the subject of difficult negotiations between plaintiffs, on the one side, and defendants, on the other side. The combined efforts of the smaller representatives of the two Groups have also brought the case to the eve of mediation. At this time, the only conclusion that can fairly be reached is that, when equally represented, the class has been well-served by the combined expertise that the two Groups have brought to the table.

Accordingly, in the interest of the class and the clients, the Consumer Counsel Group respectfully requests that the Court appoint a four-way leadership structure, with two attorneys from the Berger/Wexler Group and two attorneys from the Consumer Counsel

Group.<sup>1</sup> While the Consumer Counsel Group remains confident in its abilities (and its chance of being appointed lead), reflection on all that the two Groups have accomplished together, it seems disingenuous to upset the apple cart by totally excluding all representation from the Berger/Wexler Group. While such perspective does not come easily, it seems that this result is truly in the best interests of the class.

## II ARGUMENT

### A. UNDISPUTED FACTS

The respective submissions of the Berger/Wexler Group and the Consumer Counsel Group establish, *inter alia*, that:

First, the Consumer Counsel Group's proposed lead attorneys have significant and unique experience in both consumer class actions and mass tort litigation.

Second, the Consumer Counsel Group has established that they more than adequately satisfy the applicable criteria under Rule 23(g) and the *Manual for Complex Litigation* (4<sup>th</sup>):

- Work on the Case – Here, as noted in the prior submissions, each of the proposed leads have made significant contributions in identifying potential claims against each of the Menu Foods defendants.
- Counsel Experience in Handling Similar Claims – with due respect to the qualifications of the other attorneys, this factor clearly favors the Consumer Counsel Group's proposed lead. Proposed Lead William M. Audet has had significant experience in other similar MDL cases, such as *Baycol* (PSC), *Bextra* (PSC), and *Guidant* (PSC). Indeed, Mr. Audet has the somewhat unique distinction of significant prior mass tort / class action experience. Proposed Lead Scott A. Kamber is uniquely qualified based on his prior significant consumer class action work. While the Berger/Wexler Group correctly identified instances of Court citations to Mr. Kamber's work in the area of securities litigation, his work in consumer class actions is actually far more extensive. From his work on the defense-side during the 1990's to his leadership in recent high-profile national consumer class actions

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<sup>1</sup> With due respect to the McLaughlin application, their "Hail Mary pass" attempt to seek appointment to the leadership is utterly without support. With the exception of the McLaughlin application for lead, the McLaughlin attorneys have not been heard from in this case until the deadline for lead application. They have no significant client base and no support for leadership. They are not equal in any respect to the other two Groups seeking a leadership position in this case.

such as *In re Sony CD Technologies Litig.*, Mr. Kamber has consistently demonstrated his expertise in the successful and timely resolution of consumer class actions. Finally, Proposed Lead Jay Edelson has not only a significant number of clients and contacts, but has shown his commitment to other consumer class actions in the past. Mr. Edelson has served as lead in numerous state and federal class actions and has demonstrated a particular expertise in the litigation of cases involving statutory damages.

- Resources – Without doubt, the National Plaintiffs' three proposed Co-Lead Counsel have more than adequate resources at their disposal to prosecute this case against the defendants. Moreover, the issue is not just use of existing resources, but efficient management of the case to ensure maximum recovery for the clients and class members. While no one will dispute that several of the firms comprising the Berger/Wexler Group are larger, no one has questioned the ability of any member of the Consumer Counsel Group to bring adequate resources to bear to successfully litigate this action. Since all counsel who have applied for lead satisfy this prong of Rule 23(g), the fact that several firms may be larger is of no relevance.
- Work Cooperatively – Despite the Consumer Counsel Group's disagreement with the "management" style of the Berger/Wexler Group, they also have had no problem working together on a host of early pretrial issues. This temporary working relationship has allowed the case to move forward despite the disagreement over the "lead counsel" issues.

Third, the proposed leads of the Consumer Counsel Group were, at least initially, solely invited to "early discussions" with defense counsel based on their significant individual client base (and past work experiences with certain defense counsel in other cases). The Consumer Counsel Group had no objection to including representation from the Berger/Wexler Group in the later meetings. By so doing, the Consumer Counsel Group again showed its commitment to put leadership posturing aside for the benefit of the class.

Fourth, the proposed three-way lead structure for the Consumer Counsel Group was the result of hard work and dedication to the early phases of this case. In compliance with the *Manual for Complex Litigation* (4<sup>th</sup>), the initial motion for lead counsel was accompanied by declarations stating that, *inter alia*, no promises of work or committee assignments had been offered to any firms in exchange for any support for lead. To date, this has not been done by the Berger/Wexler Group.

Fifth, well before the ill-fated Chicago "Ballroom" meeting, the four proposed firms of the Berger/Wexler group apparently agreed — essentially amongst themselves — to a "four way" structure for lead. The so-called "majority" support was obtained by acting as if this internal agreement was essentially a court-sanctioned leadership structure.

Sixth, not one of the proposed leads in the Berger/Wexler Group has their own significant client base. Instead, it appears that their "significant" numbers of clients have actually been retained by "supporter" firms and they never comprised the "majority" originally claimed.<sup>2</sup>

Seventh, the record (as opposed to self-supporting rhetoric) establishes that the three lead counsel of the Consumer Counsel Group have contributed as much as, if not more than, their counterparts in the Berger/Wexler Group toward the progress of the cases so far. The latter group has felt the need to dramatically overstate its accomplishments to the point that they seek to portray themselves as the "only attorneys" actually working on the case. In fact, the so-called "early discussions" with the defendants, the full damage analysis, and the significant progress of the plaintiffs in the early phases of the investigation of claims in the case resulted from the efforts of the attorneys in the Consumer Counsel Group. Moreover, class members have "voted" with their retainer agreements: The three leads of the Consumer Counsel Group currently represent in excess of two thousand actual clients, more than any other firm or collection of firms.

#### **B. COURTS APPOINT ATTORNEYS – *NOT LAW FIRMS* – TO LEADERSHIP POSITIONS IN MDL CASES.**

In addition to making a number of inappropriate, false and gratuitous attacks on attorneys Scott Kamber and Jay Edelson, the Berger/Wexler Group asserts that, because its

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<sup>2</sup> The Berger/Wexler Group is apparently unsure how many clients it really has, although its initial papers affirmatively claimed that they had the "majority" of clients.

member firms are bigger, they are necessarily “better.” These attacks and arguments are without merit.

Efforts to discredit Kamber and Edelson’s work and previous experiences lack any basis. Mr. Kamber’s experience includes work on securities cases, yet the Berger/Wexler Group’s papers completely ignore the numerous consumer class actions detailed in both Mr. Kamber’s declaration and firm resume. As detailed in Mr. Kamber’s declaration in the initial application, his work in the area of consumer class actions dates back to the early 1990’s, when he worked at a well known defense firm. Mr. Kamber’s work continued on the plaintiffs side, where he served as lead counsel in numerous consumer cases (first at the firm Wechsler Harwood, LLP, and then at Kamber & Associates, LLC, a firm he founded almost three years ago). Indeed, several members of the Berger/Wexler Group have personal knowledge that Mr. Kamber recently served as lead counsel in the *In re Sony CD Technologies Litig.*, a case that was resolved in a manner universally praised and recognized as a major achievement in consumer class actions. Ironically, Mr. Kamber and his firm have been supported as lead counsel in other consumer cases by some of the largest plaintiffs firms in the country. For anyone to suggest that Mr. Kamber is an “unknown” commodity in the area of consumer class actions is disingenuous at best.

Similarly, the Berger/Wexler Group seek to fault Mr. Edelson for being “in the media,” as if that were the result of grandstanding rather than appropriate coverage of the current status of the case. Press coverage of developments in which Mr. Edelson played a key role (such as the work on the consent decree issued by this Court or the assertion of significant new legal theories aimed at vitiating the defendants’ potential arguments) has helped keep this case and the clients’ claims in the spotlight.

The Berger/Wexler Group also uses its “characterizations” of Kamber and Edelson’s qualifications as the basis for what they believe is their “trump” argument: the comparative size of its own member firms. The Berger/Wexler Group treats the size of its member law firms as reason alone to be appointed lead counsel. But, as most courts agree, attorneys — not law firms — are appointed to leadership positions in class actions and mass torts.

Nowhere in either Rule 23(g), or the *Manual for Complex Litigation* (4<sup>th</sup>), does it state that the attorney must (or even should) work for the “biggest law firm.” If this were the case, only the two or three larger firms would be appointed lead in every case. This is not what the Federal Rules intended, nor is it how courts have interpreted them. While the Berger/Wexler Group expends much of its energy emphasizing the purportedly greater size of its law firms, this is not the standard for lead appointment. The proposed lead firms of the Consumer Counsel Group have served as lead in many complex class action litigations in the past, and have the skills and resources to best lead this litigation.

In short, this Court must have faith that the individual attorneys it appoints, rather than the firms the attorneys are currently associated with, are capable and committed to representing the class members. If one takes the Berger/Wexler Group’s premise to its logical conclusion, the Court’s role in evaluating and appointing lead counsel would be reduced to comparing the net worth and the number of attorneys of the competing firms on the “principle” that bigger is better. Indeed, if this were true, the examination of an attorney’s efforts and substantive qualifications would fall by the wayside.<sup>3</sup>

### C. “DEAL OR NO DEAL”

Notably absent (again) from the Berger/Wexler Group’s opposition papers is any discussion of any deals, promises, or commitments (of, say, committee positions or of

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<sup>3</sup> Ironically, under such a regime, neither Mr. Wexler’s nor Mr. Berman’s firm would ever stand a chance if they were in competition with their current ally, the Coughlin firm.

division of work) among the proposed leads themselves or between the leads and any of their supporting forms. As outlined in the *Manual for Complex Litigation* (4<sup>th</sup>) (and discussed in prior submissions), any promises (implicit or explicit) must be disclosed to the Court.

Whether it is a promise to "include" certain attorneys in mediation discussions or commitments of any nature, the Court should be aware of all commitments as it considers any group's proposed leadership role. While the initial declarations of Attorneys Kamber, Audet and Edelson set forth the fact that the Consumer Counsel Group has made no such deals, no such declaration has ever been submitted by members of the Berger/Wexler Group.

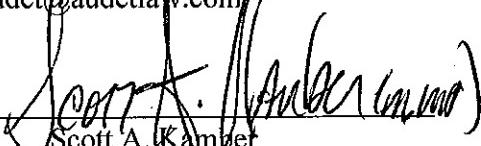
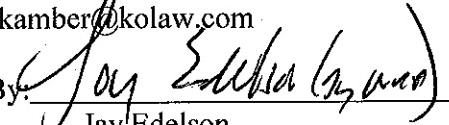
### **III** **CONCLUSION**

The Consumer Counsel Group has shown that under applicable criteria they are the best choice for lead counsel. At this juncture, however, we respectfully submit that the best solution is for the Court to appoint two members from each of the two Groups.<sup>4</sup> In choosing an equal number of members from both the Consumer Counsel Group and from the Berger/Wexler Group, the Court will ensure the continuing progress of the litigation.

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<sup>4</sup> The Consumer Counsel Group is prepared to propose to the Court the two attorneys who they recommend to serve as co-lead from the Consumer Counsel Group.

Dated: September 19, 2007

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1                   **PROOF OF SERVICE**  
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3                   **MDL 1850**  
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5                   **IN THE UNITED STATES DISTRICT COURT**  
6                   **FOR THE DISTRICT OF NEW JERSEY**  
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8 I am employed in the County of San Francisco, State of California; my business address is 221  
9 Main Street, Suite 1460, San Francisco, California 94105. I am over the age of 18 and not a party  
10 to the within action. On this date I served the following documents:  
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12                   **NATIONAL PLAINTIFFS' CONSOLIDATED**  
13                   **REPLY TO THE APPLICATION FOR LEAD COUNSEL**  
14                   **SUBMITTED BY THE BERGER/WEXLER GROUP; and**  
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16                   **PROOF OF SERVICE**  
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18 on the parties shown below:  
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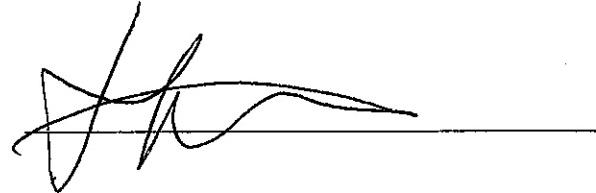
20                   **See Attached**  
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22                    X

23 (BY ELECTRONIC FILING) On this date I provided the documents(s) listed above  
24 electronically through the Court's electronic filing service provider pursuant to the  
25 instructions on that website.  
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27 I declare under penalty of perjury under the laws of the State of California that the above is  
28 true and correct.  
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30 Executed on this 19th day of September, 2007 at San Francisco, California.  
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